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Supreme Court, U.S.
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No. 01-885

IN THE

SUPREME COURT OF THE UNITED STATES

ANTHONY KEITH JOHNSON,

Petitioner,

v.

JOHN E. NAGLE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The respondent, Warden John E Nagle, considers the following to be a fair and comprehensive statement of the questions presented for review:

1. Whether trial counsel's performance in not raising a defense that Johnson did not intend to kill was presumptively prejudicial when trial counsel's investigation revealed that Johnson did have the intent to kill.

2. Whether Johnson's contention that the court of appeals did not conduct an aggregate analysis of the ineffective assistance claims is factually accurate.

3. Whether the court of appeals correctly determined that requesting a felony murder instruction prejudiced Johnson because there was no basis for the trial court to give such a charge.

4. Whether the court of appeals correctly determined that a suppressed police report was not "material" because it did not dispute Johnson's presence at the crime scene.

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OPINIONS BELOW

On direct appeal, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Johnson's conviction and sentence. *Johnson v. State*, 521 So. 2d 1006 (Ala. Crim. App. 1986), *aff'd*, *Ex parte Johnson*, 521 So. 2d 1018 (Ala. 1988). This Court denied certiorari review. *Johnson v. Alabama*, 488 U.S. 976 (1988).

Johnson filed a state collateral attack on his conviction and death sentence pursuant to Rule 20 (now Rule 32) of the *Alabama Rules of Criminal Procedure* on April 4, 1989. After conducting an evidentiary hearing, the state circuit judge denied the petition. The Alabama Court of Criminal Appeals affirmed this ruling in an opinion authored by retired Alabama Supreme Court Justice James H Faulkner. *Johnson v. State*, 612 So. 2d 1288 (Ala. Crim. App. 1992), *cert. denied* (Ala. 1993).

In June 1993, Johnson filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Alabama. After holding an evidentiary hearing, United States District Judge Edwin Nelson denied Johnson's habeas petition. *Johnson v. Nagle*, 58 F.Supp.2d 1303 (N.D. Ala. 1999). The court of appeals affirmed the district court's decision. *Johnson v. Alabama*, 256 F.3d 1156 (11th Cir. July 10, 2001), *rehearing and rehearing en banc denied*, 273 F.3d 1123 (Sept. 14, 2001).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1). This Court should not, however, review the second issue because it was not squarely

presented to the court of appeals or the third issue because it was not raised in the courts below.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

The statement of constitutional provisions and statutes involved in this case, which set forth on page two of the certiorari petition, is correct.

STATEMENT OF THE CASE

Johnson's present counsel first presented, in his initial state post-conviction petition, an entirely new version of events -- that Johnson participated in the robbery but did not have the intent to commit murder. Specifically, Johnson contends that trial counsel was ineffective for not presenting a theory that he was not one of the two robbers that went into the victim's home. Johnson's theory, which the courts have called the "third man" theory, is that the evidence supports a conclusion that Johnson accompanied two men who entered the Cantrell residence and fired shots at the victim, but only entered the house during a lull in the shooting just in time to be hit in the back by the dying victim's last shot. "This new conception of events has wound its way into almost every argument in this case[,]" *Johnson*, 58 F.Supp.2d at 1329, including this certiorari petition.

Unfortunately for Johnson, there are at least two problems with his "third man" theory. First, Johnson, despite being afforded evidentiary hearings in state and federal court, offers no evidentiary support for the "third man" theory. No person, not even Johnson himself, has

ever testified that Johnson accompanied two people into the victim's home for the purpose of committing a robbery, but that he did not participate in the murder of the victim. The Alabama Court of Criminal Appeals stated that "Johnson's 'third robber' theory is merely a theory without any evidentiary support." *Johnson*, 612 So. 2d at 1304. Second, evidence presented at the federal court evidentiary hearing demonstrated that Johnson's "third man" theory is perpetrated upon a fraud in that Johnson, before his trial, told his trial counsel that he was the second robber into the house and that he fired three shots at the victim. Habeas Tr. (March 19, 1996) at 22-27[1] (testimony of Joseph Probst), Id. at 53-58 (testimony of Thomas DiGiulian).[2]

The record of the state and federal court proceedings demonstrate that Johnson's present counsel fought very hard to keep out of the record any evidence of what Johnson told trial counsel. After the federal district court ordered an evidentiary hearing, Johnson's present counsel filed an interlocutory appeal that resulted in the court of appeals initially staying the hearing and then directing the district court to conduct an *in camera* hearing "to determine whether and to what extent Johnson had waived his attorney client privilege by attacking the competency of his attorneys." *Johnson*, 58 F.Supp.2d at

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[1] Citations to hearings held in February and March 1996 pursuant to Johnson's federal habeas petition are cited as "Habeas Tr. (date) at []." Citations to the record of the state post-conviction proceedings are cited as "R20 at []." Citations to the trial transcript are cited as "Tr. at []."

[2] Johnson's trial counsel was Joseph Probst and Thomas DiGiulian. Reference to them will be by the term "trial counsel" unless one is mentioned specifically by name.

1326-27 n. 14. The Eleventh Circuit ultimately vacated these orders and allowed the district court to conduct a hearing regarding "what [Johnson] told counsel about the crime and his role in it in order to assess whether their strategic and tactical choices were reasonable in the light of the information known to them." *Johnson*, 256 F.3d at 1168 n. 4. Evidence presented during the federal court hearing "revealed that present counsel were aware as early as 1988, before they filed their first Rule 20 petition, that Johnson had told his trial attorneys that he was, in fact, present at and participated in the robbery; that he personally fired shots at Mr. Cantrell; and that he was himself wounded by Mr. Cantrell." *Johnson*, 58 F.Supp.2d at 1326-27 n. 14. The court of appeals concurred with this finding stating that "these statements are indeed at odds with the theory of defense advanced now by Johnson's habeas counsel." *Johnson*, 256 F.3d at 1169.

A. Evidence Presented at Trial

The facts presented at trial are set forth at length in the opinions of the court of appeals and the district court. *Johnson*, 58 F.Supp.2d at 1314-15; *Johnson*, 256 F.3d at 1165-67. They show that, on the evening of March 11, 1984, the victim, Kenneth Cantrell, and his wife were at their home in Hartselle, Alabama. The Cantrells ran a jewelry business out of their home and were known to have large sums of money on hand. Johnson and another man, whose identity was first publicly revealed at the federal district court evidentiary hearing, entered the Cantrell's home for the purpose of robbing him. Both Johnson and the other robber were armed with loaded pistols and, during the exchange of gunfire that led to Mr. Cantrell's death, both Johnson and the other robber fired multiple shots at Mr. Cantrell. Johnson fired three shots, including the first shot that was fired by anyone. Mr. Cantrell returned fire, firing a total of six shots. Mrs.

Cantrell could not identify Johnson because he was wearing a blue bandana that covered his face.

After being mortally wounded, and with the last shot in his pistol, Mr. Cantrell fired a shot through a glass pane in the opened door and hit Johnson. At the time he was hit, Johnson was either standing in the dining room area behind the open door or was in the process of backing out or going out of that door. The bullet struck Johnson in the back and, when later removed under court order, it still had glass fragments embedded in its nose. The bullet was of the same type manufacturer used by Mr. Cantrell, and the bullet had the same number of lands and grooves as those test fired from Mr. Cantrell's handgun. Additionally, test comparisons of the glass removed from the bullet with that found in the pane on the door revealed that all of their physical properties matched, with no measurable discrepancies.[3]

After being shot, Johnson soon sought out the assistance of his friend, David Lindsey, for the purpose of seeking medical attention. Johnson told Lindsey he knew that Lindsey had been to Vietnam and asked if he knew a medic or someone who could get the bullet out. After telling Johnson he did not know anyone who could do that, Lindsey drove Johnson to a motel room to meet some of Johnson's friends. Lindsey heard Johnson make an admission of guilt during a conversation that took place in the motel room. Specifically, Lindsey heard

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[3] Johnson contends that the court of appeals erroneously stated that "counsel did not learn of the State's evidence concerning the glass fragments until the 'eve' of trial." *Johnson's certiorari petition at 5 n. 3.* One of Johnson's trial counsel stated he received this evidence "way late," "within two or three weeks of trial." Habeas Tr. (March 19, 1996) at 40. The court of appeals' statement, therefore, was correct.

Johnson say that he had gone into a place to get some gold and had been shot. Then Johnson said, "I got shot, but I got off a couple of rounds, and I believe I got that son of a bitch." Upon returning to his home and finding out that there had been a murder in Hartselle, Lindsey immediately contacted law enforcement authorities.

When Johnson was arrested, he had in his possession a nickel-plated .357 caliber handgun. The weapon was consistent with Mrs. Cantrell's statement that the second robber was wielding a "real shiny" gun. None of the projectiles found at the crime scene could, however, be matched with Johnson's gun. Although one of the spent projectiles found at the scene was the approximate weight of a .38 or .357 caliber, it was too mutilated to tell if it had been fired by Johnson's gun. Tr. 607, 676-77. Johnson's gun, when found, had only three rounds in it, consistent with the forensic evidence that indicated the second robber had fired three times. *Johnson*, 256 F.3d at 1174 n. 9. Additionally, Johnson had a pair of brown boots that corroborated Mrs. Cantrell's testimony that the second robber into the home was wearing brown boots.

B. Trial Counsel's Performance

The record of the state and federal post-conviction proceedings show that, as part of their pre-trial preparation, trial counsel talked with potential witnesses and met extensively with Johnson. R20 at 638-39, 657, 58, 661, 737, 741. Johnson told trial counsel "the whole story," R20 at 638-39, and the defense theory was based upon what he told them. R20 at 638-39, 657-58, 661 737, 741. More specifically, the chosen defense was that Johnson was not present at the crime scene and was, therefore, not involved in the crime at all. R20 at 603, 674-75, 689, 694, 696-97, 739-40. Consistent with his previous testimony during the state post-conviction

proceedings, Thomas DiGiulian testified at the federal court evidentiary hearing as follows:

> We knew, or thought we knew, what the State could prove based on the preliminary hearing that we had and the transcript of that. And we decided that they couldn't prove the case, and that we felt like our best shot at winning was to take the position that Keith was not there and make the State prove it.

Habeas Tr. (Feb. 29, 1996) at 20-21. Trial counsel also knew, from their conversations with their client describing his involvement in the crime, that Johnson was guilty of capital murder and, therefore, they could not present any false testimony of the nature that he was a participant in the robbery but not in the murder. Habeas Tr. (March 19, 1996) at 59 ("I cannot ask him a question that will elicit an answer that I know is not true.")

Trial counsel made a reasoned strategic decision not to argue inconsistent alternative theories of defense. This decision obviously prevented them from arguing that Johnson was not at the scene while, at the same time, asserting he was involved but lacked the intent to kill. R20 at 603, 615-16, 632, 689-90, 694, 695, 967, 700, 702, 704. That strategic decision not to argue inconsistent theories was based upon trial counsel's informed judgment that, as a practical matter, there was little or no chance the jury would fail to find that Johnson had the intent to kill if the jury concluded that he had been at the scene. Trial counsel knew, at the time they made their strategic decision, that deliberation and premeditation were not required under Alabama law, and, therefore, it was irrelevant whether Johnson had the intent to kill before he went into the house. R20 at 607, 672. They also knew that if he had the intent to kill, Johnson could be

guilty of the capital offense even though he was not the actual triggerman. R20 at 703-05, 744-45.

Trial counsel gave consistent testimony at the state post-conviction hearing and federal court evidentiary hearing that showed they understood the State must demonstrate Johnson had the specific intent to commit murder. For example, Thomas DiGiulian stated the following:

> We had – if I remember the testimony correctly, there was one piece of physical evidence that linked Keith to that crime. And in my understanding of the facts, the only way that that evidence – talking about the glass in the nose of the bullet – he had to have been inside the house. And it was my understanding, based on those facts, that if the jury believed the expert testimony about the refractive index of the glass, that he would be convicted because he was in the house. There was only testimony of two people coming in[to the Cantrell house].

R9-58 at 68. This testimony reflects trial counsel's belief that, if the jury found Johnson was one of the two people in the Cantrell house, he would be found guilty of capital murder.

C. Johnson's "Third Man" Theory

Johnson's arguments are built upon the fact that under Alabama law the felony murder doctrine does not elevate intentional murder to capital murder. *See, e.g., Lewis v. State*, 456 So. 2d 413, 416 (Ala. Crim. App. 1984) ("[N]o defendant is guilty of a capital offense unless he had an intent to kill, and that intent to kill cannot be supplied by the felony murder doctrine."). According to

Johnson, the evidence at trial could be interpreted to indicate that there were three robbers on the scene, and that Johnson was not the second man, but rather the third man to enter the Cantrell home. Trial counsel, so Johnson contends, could have argued and sought instructions that allowed the jury the opportunity to find him guilty of felony murder, rather than capital murder.

Johnson bases his facile argument on some minor discrepancies in Mrs. Cantrell's testimony. The federal district court correctly notes that "[h]er testimony was a bit confused and difficult to follow, as well as inconsistent with the physical evidence in some significant respects." *Johnson*, 58 F.Supp.2d at 1330. Most objective observers would perhaps conclude that this is understandable since she was present in a small room where a gunfight took place and although she came out of it physically unhurt her husband was murdered before her.

Johnson's "third man" theory appears to rest entirely on the following part of Mrs. Cantrell's testimony:

> Q: Now, do you recall in your house that night where each of these two intruders were when your husband fired the last shot?
>
> A: They were over towards the door.
>
> Q: Now, in your recollection were they leaving the house or were they coming [sic] the house?
>
> A: They were leaving.
>
> Q: They were leaving. Now, they were leaving the house.
>
> A: I assume they were.

Q: Now, and your husband fired one last shot, is that correct?

A: That is correct.

Q: How long after that was it that you heard them leave the house?

A: It didn't take them long after that to start moving over further towards the door.

Q: Further towards the door?

A: That is right.

Q: So neither one of them was at the door when your husband fired the last shot?

A: No, they wasn't.

Q: They were not?

A: No.

Q: Was it inside the door now that we are talking about?

A: Yes.

Q: Was it open?

A: Yes, it was.

Tr. 385-86. Mrs. Cantrell speculated that the men "were probably going through things, looking for things." *Id.*

It is indeed very unusual to have a case in this posture where a theory teeters so precariously upon a misinterpretation of the record. Mrs. Cantrell testified that she was at her husband's feet between the coffee table and the couch while the shooting was taking place. Tr. 363, 365. She was consistent in her testimony making reference to a "first man" and a "second man" being

involved in the robbing and killing of her husband.[4] Tr. 360, 361, 362, 363, 364, 380, 381, 382, 383, 384, 385, 387, 388, 391, 392, 393, 394, 395. Nowhere in any of these references does she mention a "third man."[5] At the end of her testimony, the following reference leaves no doubt that Johnson's "third man" theory lacks any evidentiary support:

> Q: After your husband fired the last shot, the two men left, is that correct?
>
> A: Yes.

Tr. 387. The federal district court correctly notes that Mrs. Cantrell's preliminary hearing testimony gave trial counsel no reason to think about a "third man" defense:

> It is no exaggeration to say that none of the information counsel gathered in this fashion suggested even the possibility of a "third man" defense. Mrs. Cantrell's preliminary hearing testimony was not infected the problems which [Johnson] points to in her trial testimony. Indeed, at the hearing Mrs. Cantrell did not say much about the actual course of the gunfight and its aftermath, maintaining that after the first shots were fired she "couldn't tell nothing. It sounded like a bunch of fireworks." Transcript of Preliminary Hearing Held April 19, 1984 ("PHT") at 54;

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[4] Mrs. Cantrell's reference to a "first man" and "second man" signifed their order of entry into the house.

[5] Johnson's trial counsel also only referred to a "first man" and "second man." See, e.g., Tr. 380-81. Trial counsel never referred to a "third man."

> see id. at 53, 70. On the other hand, she certainly did not seem to be of the opinion that a third man had entered the house, and indicated that the two intruders she described were all that were present "to [her] knowledge." PHT at 78.

Johnson, 58 F.Supp.2d at 1343. Trial counsel's notes, notes that Johnson's present counsel tried so hard to suppress from judicial view, establish that Johnson told his trial counsel a story very similar to Mrs. Cantrell's, a story which included the information that it was he who was the second robber in the house and that he fired several shots at the victim. See, e.g., Habeas Tr. (March 19, 1996) at 22-24, 29-30, 57-60, 74-75, 79.

REASONS FOR DENYING THE PETITION

This Court should deny certiorari review because none of Johnson's claims are worthy of certiorari jurisdiction. Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. *Fay v. Noia*, 372 U.S. 391, 436 (1963), *overruled in part on other grounds by Wainwright v. Sykes*, 433 U.S. 72 (1977). Johnson does not set out sufficient reasons for this Court to grant certiorari on any of his claims.

I. TRIAL COUNSEL'S FAILURE TO RAISE A FELONY MURDER DEFENSE WAS BASED UPON THE FACT THAT THEY HAD NO EVIDENCE TO SUPPORT IT

Johnson contends that the performance of his trial counsel was *per se* deficient, under the test set out in *United States v. Cronic*, 466 U.S. 648 (1984), in not pursing the "third man" defense. Johnson further contends that the Eleventh Circuit's ruling that trial counsel's performance was not so presumptively prejudicial as to fit within the *Cronic* standard is in conflict with decisions from other circuits. Johnson's contentions are not worthy of further review because he has not shown any conflict and the decision that trial counsel's performance was not presumptively prejudicial is correct and supported by the record.

The Eleventh Circuit correctly ruled that *Cronic* "applies when counsel 'entirely' fails to challenge the prosecution, and that is indisputably not so here." *Johnson*, 256 F.3d at 1187 n. 17. In *Cronic* this Court held:

> The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred.

Cronic, 466 U.S. at 656. This holding implies that the inquiry is whether counsel's conduct is such that it can be recognized as completely inappropriate in any case, so

bad that the defendant's counsel wasn't really acting as a lawyer at all.

Trial counsel's actions to not pursue the "third man" defense was based upon the fact that they had information from Johnson that indicated he was guilty of capital murder. This information was that Johnson was the second man into the house who announced "this is a holdup" and fired his gun before anyone else. Trial counsel had no information that Johnson had intent to commit only a robbery but not a murder. Trial counsel did not pursue a "third man" defense due to some presumptively prejudicial action or inaction, but rather because no evidence supported such a theory.

Johnson cites cases from the Sixth, Ninth, and Tenth Circuits as evidence that this case conflicts with those decisions. In *Cone v. Bell*, 243 F.3d 961, 977 (6th Cir. 2001), the court ruled that trial counsel's decisions to not present any evidence at the penalty phase and to waive closing argument was presumptively prejudicial under *Cronic*.[6] In *Osborne v. Shillinger*, 861 F.2d 612, 629 (10th Cir. 1988), the court ruled it was presumptively prejudicial under *Cronic* that trial counsel intentionally stressed the brutality of the defendant's crime, admitted that the evidence against his client was overwhelming, and made statements to the press that his client had not evidence to support his claims. The court further stated that "Osborn's attorney did not simply make poor strategic choices; he acted with reckless disregard for his client's best interests and, at times, apparently with the intentions to weaken his client's case." *Id.* In *United*

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[6] This Court recently granted certiorari review in *Bell*, presumably to determine whether trial counsel had legitimate strategic reasons for taking certain actions.

States v. Swanson, 943 F.3d 1070, 1074 (9th Cir. 1991), the court ruled trial counsel's performance was presumptively prejudicial under *Cronic* when he conceded in closing argument that there was no reasonable doubt that his client had robbed the bank, apparently the only factual issue in dispute. The present case does not present the "situation in which an attorney's conduct can be assessed generically and condemned as an utter failure of representation." *Johnson*, 58 F.Supp.2d at 1339. Johnson has not cited a case that has applicability to the facts in this case. This issue is clearly not one "where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Therefore, Johnson's claim is unworthy of certiorari review.

II. THE COURT OF APPEALS CORRECTLY DECIDED THAT IN VIEWING THE TOTALITY OF THE EVIDENCE TRIAL COUNSEL'S PERFORMANCE WAS REASONABLE

Johnson contends that, even if the errors of his trial counsel were not individually ineffective, when considered as a whole and in the context of the entire trial, the cumulative effect of these errors undermined confidence in the outcome of the trial. He specifically contends that the court of appeals rejected his entreaty to conduct an aggregate analysis of trial counsel's performance. Johnson asserts that the "Eleventh Circuit's piecemeal approach to assessing performance error is inconsistent with this Court's opinion in *Strickland*, and is in direct conflict with decisions of the Second, Fifth, Sixth, Seventh, and Ninth and (apparently) Tenth Circuits." *Johnson's petition at 15.*

In his haste to concoct an issue worthy of certiorari review, Johnson overlooks the fact that the court of

appeals did look at allegations of trial counsel's errors in the aggregate. The court stated in relevant part as follows:

> As best we can tell, Johnson makes two separate arguments based on *Cronic*. First, he contends that his attorneys' errors, viewed in the aggregate, constitute prejudicial ineffective assistance of counsel even if none of those errors, standing alone, constitutes a *Strickland* violation. We disagree; to the extent Johnson's attorneys committed performance errors, **those errors in the aggregate do not warrant setting aside his conviction.**

Johnson, 256 F.3d at 1187 n. 17. The court did not engage in an extensive analysis because Johnson did not specifically raise this issue.

In his brief to the court of appeals, Johnson does not squarely present this issue. Instead, in his introduction to the part of the brief listing the **individual** claims of ineffective assistance of counsel, Johnson states: "Viewing counsel's errors in the aggregate, as this court must do, it is clear that Johnson is entitled to relief under *Strickland*." *Johnson's 11th Circuit brief at 23.*[7] If the court of appeals' analysis of this issue was cursory, it was due to the fact that Johnson did not squarely present this issue to the court of appeals. Because of the fact that the court of appeals did review in aggregate, Johnson's claims

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[7] Ironically, even though in his petition to this Court Johnson lists the Eleventh Circuit as a circuit that does not review ineffective claims in the aggregate, in his brief to the court of appeals he cited circuit precedent indicating otherwise. *Johnson's 11th Circuit brief at 23 n. 14.*

of ineffective assistance of counsel, this claim is unworthy of certiorari review.

Furthermore, there is no conflict in the circuits on this issue. All of the circuits are applying this Court's holding in *Strickland* to "look at the totality of the evidence before the judge or jury," in determining whether the specific "acts or omissions of counsel" are constitutionally ineffective. *Strickland*, 466 U.S. at 688. This Court does not require a cumulative effect analysis of ineffective claims as is required in claims alleging that the prosecutor suppressed evidence. *See Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (Evidence that the government failed to disclose to the defendant is considered collectively, not item-by-item, in determining whether "materiality" requirement of *Brady* has been satisfied.) In rejecting this issue, the district court clearly followed the holding of *Strickland* that each alleged error is to be individually analyzed in light of all the evidence presented:

> Nor is *Strickland's* rule adaptable to the generalized allegations leveled by petitioner. By its very nature, the *Strickland* analysis focuses on particular errors and the harm which flows from them. *Strickland* makes it clear that, to prove a claim of ineffective assistance of counsel, a habeas petitioner must identify a specific error and show prejudice flowing from that error. Nothing in *Strickland* suggests that a combination of several errors can be prejudicial when none, standing alone, would be sufficient to authorize relief.

Johnson, 58 F.Supp.2d at 1351-52. There is no conflict in the circuits on this issue and, even if there is, this case is not worthy of certiorari jurisdiction because the court of

appeals conducted the type of analysis that Johnson requested.

III. JOHNSON DID NOT RAISE IN THE COURTS BELOW THE ISSUE THAT IT WAS A DUE PROCESS VIOLATION FOR THE JURY NOT TO BE INSTRUCTED ON FELONY MURDER

Johnson presses an issue in his certiorari petition that he did not raise in the district court of the court of appeals. *See Johnson*, 58 F.Supp.2d at 1324-27 (listing the seven claims that were raised in the habeas petition). In his certiorari petition, Johnson raises the allegation that it was a violation of *Beck v. Alabama*, 447 U.S. 626 (1981), for the jury not to be instructed on felony murder. *See Johnson's certiorari petition at 23 n. 12* ("We deal with the *Beck* issue in this petition as an issue of due process.") This claim was raised in the courts below, however, as a claim of ineffective assistance of counsel because trial counsel did not seek a jury instruction on the offense of felony murder. *Johnson*, 58 F.Supp.2d at 1346-49; *Johnson*, 256 F.3d at 1181-83 ("Here, the question is different, in that we focus not on whether there was a Due Process violation, but rather whether the failure of Johnson's trial attorneys to ask for a felony murder instruction amounted to *Strickland* performance error and prejudice"). Because this claim was not raised in the courts below, this Court cannot grant certiorari review. *See* Rule 10, *Rules of the Supreme Court of the United States* (requiring that the federal question have been raised in the lower courts).

The court of appeals determined that Johnson was not prejudiced by the fact that his trial counsel did not seek an instruction on felony murder. The court stated as follows:

Like the district court, we can find no logical basis to conclude that an additional alternative charge would have led a rational jury down a different path. The jury already was presented with non-capital alternatives (intentional murder and robbery) and still found Johnson guilty of capital murder. A felony murder instruction would not have changed the standard for a conviction on capital murder, and so for an objective and rational jury – and we must presume this was such a jury – an instruction on that offense should not have changed the outcome. [Citation and footnote omitted.] Johnson's belief that the jury might have doubted the evidence of his intent to kill, but then nevertheless chosen to convict him for capital murder because it thought the only alternative was robbery and that offense would be too minor, is pure speculation, and highly strained speculation at that.

Moreover, as discussed above, there is little evidentiary foundation for Johnson's belief that the jury in his case might have been inclined to convict for felony murder in lieu of the other offenses. The weight of the evidence pointed to only two men, not three, with Johnson as either (1) one of the two men and therefore guilty of capital murder, or (2) not one of them and therefore not guilty altogether. That issue was the focus of the evidence and of the parties' arguments before the jury. In this context, unintentional murder was not so viable an option for the jury that the absence of an

> instruction on felony murder amounts to *Strickland* prejudice.

Johnson, 256 F.3d 1183. This ruling is a correct application of the principles this Court stated in *Beck* and *Schad v. Arizona*, 501 U.S. 624 (1991), and this Court, therefore should not grant certiorari review.

As the court of appeals correctly noted, there is absolutely no evidence to support the giving of a felony murder instruction. The Alabama Court of Criminal Appeals has noted on many occasions that the "purpose of the felony-murder doctrine is to hold felons accountable for unintended deaths caused by their dangerous conduct." *White v. State*, 587 So. 2d 1218, 1231 (Ala. Crim. App. 1990), *aff'd*, 587 So. 2d 1236 (Ala. 1991), *cert. denied*, 502 U.S. 1076 (1992). Thus, "[t]he offense of felony murder involves an intended felony and an unintended homicide." *Apicella v. State*, 2000 WL 218172 (Ala. Crim. App. Feb. 25, 2000), *aff'd*, *Ex parte Apicella*, 2001 WL 306906 (Ala. Mar. 30, 2001), *cert. denied*, *Apicella v. Alabama*, 122 S.Ct. 824 (Jan. 7, 2002). The evidence shows that Johnson accompanied one other person into the Cantrell home and that the victim received six gunshot wounds resulting in his death. Johnson carried a loaded weapon into the house and there was evidence presented that would allow a jury to conclude that Johnson had fired his gun three times. While the shots that Johnson fired were not the shots that killed the victim, there was no reasonable basis for the jury to doubt that Johnson had the intent to kill, attempted to kill, and actively participated in the killing. Soon after the shooting, Johnson commented to his friend that he had fired his weapon and thought he shot the victim. Based upon these facts, there is no rational basis for a verdict convicting Johnson of felony murder. *See* ALA. CODE § 13A-1-9(b) (1975) ("The court shall not

charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense.") There is not any evidence that the two people who went into the Cantrell house shot their guns unintentionally; indeed, all of the evidence shows that they acted intentionally. Because trial counsel's actions in not requesting a felony murder instruction did not prejudice Johnson, this Court should not grant certiorari.

IV. THE COURT OF APPEALS CORRECTLY DETERMINED THAT A SUPPRESSED POLICE REPORT WAS NOT "MATERIAL" BECAUSE IT DID NOT DISUPUTE JOHNSON'S PRESENCE AT THE CRIME SCENE

Johnson contends that this Court should grant certiorari to review his contention that the State violated the rule set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to produce "all information favorable to the defense" as requested in the defendant's pretrial discovery motion. Johnson focuses this Court's attention on a case report prepared by the Alabama Bureau of Investigation (ABI), which suggested that the police had identified suspects other than Johnson. *Johnson*, 58 F.Supp.2d at 1362.[8] Johnson correctly notes that the court of appeals states, since the ABI report was

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[8] The ABI report contains information that was addressed in the lower courts that is not mentioned by Johnson in his certiorari petition. Additionally, the lower courts addressed the claim that documentary evidence that the state was investigating two other suspects was suppressed. Because Johnson does not mention these parts of his *Brady* claim that were litigated below, the respondent will not either.

inadmissible, it could not have been used as substantive evidence for the defense. Johnson criticizes this holding by stating that "[t]he duty to disclose under *Brady*, however, extends to material that can be used in questioning adverse witnesses." *Johnson's certiorari petition at 26 n. 13.*

Johnson fails to note, however, that the court of appeals did conduct an analysis how this information could have been used in cross-examining Sergeant Newell of the ABI. The court stated as follows:

> Of course, to the extent the ABI report or the investigative notes merely suggested that there may have been participants other than Johnson in the attempted robbery of the Cantrells, that information does not establish that Johnson was not involved, or indeed that he was not the "second man." More to the point, we are unconvinced that evidence of that sort – identifying additional participants in the crime, but not directly disputing Johnson's presence or status as the "second man"[9] – could have been used to discredit in any meaningful way Sergeant Newell's testimony. Significantly, there was already evidence before the jury regarding the alleged involvement of other participants.

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[9] Johnson's conclusion that "the report excluded Johnson as one of the two participants in the killing of Cantrell," *see Johnson's petition at 25*, is incorrect.

Johnson, 256 F.3d at 1190. The court ultimately concluded that the use of this information during the cross-examination of Sergeant Newell would have been limited by the fact that the report only discloses information that the jury already knew, that others were involved, and it does not dispute the fact that Johnson was the second robber into the house.

Both trial counsel knew that the authorities had other suspects in the case and they specifically knew that the McCulloch brothers, the names mentioned in the ABI report, were suspects. Joseph Propst testified at the state post-conviction evidentiary hearing that he had not only heard rumors before the trial that the McCullochs were suspects, he had been told that they were by Sergeant Newell. R20 at 657-58. Both trial counsel testified at the federal court evidentiary hearing that they had been told by Keith Johnson that Garland McCulloch went into the Cantrell home first, Johnson went in second, and a person named Campbell was at the house but probably did not go into to the house. Habeas Tr. (March 19, 1996) at 57. Thomas DiGuiulian testified at the state post-conviction hearing that he talked with Sergeant Newell on several occasions before the trial and that Sergeant Newell told him there were other suspects. R20 at 747. In addition to the fact that trial counsel had the information to cross-examine Sergeant Newell regarding the existence of other suspects, the information contained in the ABI report only confirmed that Johnson did not act alone, something that was already known to everyone including the jury. There has never been a dispute that at least one other robber was involved in the crime. The actual identity of the other robber, and of any additional accomplices, does not exculpate Johnson who was present and who fired shots in an attempt to kill the victim.

Because the court of appeals correctly decided this issue, certiorari should not be granted. Furthermore, Johnson has not shown that the court of appeals decision is in conflict with a decision of this Court. Rule 10, *Rules of the Supreme Court of the United States.*

CONCLUSION

The Court should not grant certiorari for the reasons stated in this brief in opposition.

Respectfully submitted,

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